TOH SEAK KENG

v.

LIM HUANG CHEOW & ORS., TOH SEOW NGAN & ORS. AS INTERVENERS; & ANOTHER CASE

HIGH COURT KUALA LUMPUR
VC GEORGE J
[ORIGINATING PETITION NO. C2 OF 1982, CIVIL SUIT NO. C4-22-295-86]
1 APRIL 1989

CIVIL PROCEDURE: *Consent order - Application to set aside consent order - Question of estoppel by conduct.*

A consent order was entered into between the petitioner and the 1st and 2nd respondents in which it was ordered that the respondent purchase 390,000 shares in the company registered in the name of the petitioner and 5 other members of his family.

Subsequently the petitioner applied to set aside the consent order on the ground that he had never given instructions to his Counsel to consent to the sale of the shares and neither did members of his family give instruction to sell their parts of the shares. The said 5 members of the petitioner's family also affirmed an affidavit to support the petitioner's application.

The petitioner's application was dismissed on the ground that the judgment had been perfected and accordingly could not be set aside. Being dissatisfied, the petitioner filed a new suit to set aside the consent order but was again failed to have it set aside.

The said 5 members of the petitioner's family have in turn caused their Writ 22-295-86 to issue seeking for the consent order, to the extent that it affected them to be set aside. Eventually the then pending application for execution of the consent order by the respondents in the originating petition and the Civil Suit 22-295-86 were consolidated and heard together.

During the hearing both Counsels agreed that there was a preliminary issue to be resolved i.e. whether members of the petitioner's family (the plaintiff in this suit) are estopped from challenging the validity of the consent order. Defendants' Counsel conceded that when the consent order was made the Court in fact had no jurisdiction to make an order binding on the plaintiff in that they were not parties in the originating petition. Both parties agreed that if the Court holds that the plaintiff are estopped then the civil suit will be dismissed and the application for execution of the consent order will be granted. It will be *vice versa* if Court holds otherwise.

Relying on *Abuakwa v. Adanse*, the defendants' Counsel submitted that the plaintiff were estopped by conduct because there was an active participation by the plaintiffs in previous proceedings. They are taking an active benefit from the judgment in the previous proceedings; and in any event standing by and watching the issues fought out or at least giving evidence in support of the petitioners.

In reply, the plaintiff's Counsel contended that the *Abuakwa's* case is distinguishable. However, the plaintiff's Counsel further contended that the petitioner's suit seeking to have the consent order set aside and was based on lack of instructions again and although it was dismissed there is nothing to stop him from filing a fresh suit this time based on, say mistake. He contended that if the petitioner could do that, the right of the plaintiff to file the action based on mistake is even more so.

Held:

[1] It is the fact there were previous proceedings to set aside the consent order. On the strength of the rule set out in *Henderson v. Henderson* and applied in *Yat Hung Investment Co. Ltd. v. Das Heng Bank Ltd.*, it is not open to the petitioner to file a fresh action seeking to have the consent order set aside on grounds not pleaded in his earlier action. He should have brought forward his whole case and not having done so he will not be permitted to open the same subject of litigation in matters which could have been brought up for adjudication in the previous proceeding but were not.

[2] The plaintiffs in this suit are also estopped because the plaintiffs went beyond just standing by and watching the issues fought out in the earlier proceedings by the petitioner. There was clearly the intention to use those proceedings and there was active participation by them in each of those proceedings in the affirming of those affidavits by which they moved the Court for the desired result.

[3] Applying the principles in respect of estoppel by conduct as set out in *Abuakwa v. Adanse* to the facts of the case, the plaintiffs in the instant Civil Suit 22-295-86 estopped by their previous conduct are from now challenging the validity of the consent order by the vehicle of the Civil Suit 22-295-86.

[4] The said civil suit is dismissed with costs and there will be such an order and the necessary consequential orders were made.

[Order accordingly.]

Cases referred to:

Abuakwa v. Adanse [1957] 3 All ER 559
Yat Hung Investment Co. Ltd. v. Dao Heng Bank Ltd. [1975] AC 581
Henderson v. Henderson [1843] 3 Hare 100
Ee Kim Kin v. CLR [1967] 2 MLJ 89

Legislation referred to:

Companies Act 1965, s. 181

For the petitioner - J.S. Tan; M/s. Low Hop Bing & Associates
For the respondents - S. Selvarajah; M/s. Fernandez & Co.
For the interveners - S.C. Loh; M/s. Cheang & Ariff
For the plaintiff - S.C. Loh; M/s. Cheang & Ariff
For the defendants - S. Selvarajah; M/s. Fernandez & Co.

JUDGMENT

VC George J:

By Originating Petition No. C2/82 brought pursuant to s. 181 of the Companies Act 1965 Toh Seak Keng as a minority shareholder in Yew Lee Feedmills Sdn. Bhd. set out a number of complaints against some of his fellow directors who are respondents 1, 2 and 3 to the petition and prayed for an order *inter alia* that those respondents purchase his shares in the company. When the petition came on for hearing on 3 October 1983 the petitioner was absent. However, Counsel for the petitioner was present and he and Counsel for the respondents appeared before the Judge and had recorded a consent order by the terms of which it was ordered that the 1st and 2nd respondents purchase 390,000 shares in the company registered in the name of petitioner and in the name of various members of his family at the

price of RM1.90 only per share. Of this lot of shares only 140,000 were registered in the name of the petitioner. The rest of the shares were held in lots of 50,000 in the name of each of 5 different members of the petitioner's family.

On 17 December 1984 the petitioner took out an application in the said petition seeking for an order that the consent order be set aside and for certain other reliefs. This application was supported by the petitioner's affidavit. The petitioner stated that he had never given instructions to his Counsel to consent to the sale of the shares. He also pointed out that the orders affected not only him but members of his family in relation to their own shareholdings in respect of which they had not given instructions and he particularly pointed out that they were not parties to the petition.

The said 5 members of the petitioner's family who are his wife and 4 sons affirmed an affidavit which was filed in support of the petitioner's said application. *Inter alia* they confirmed that in fact each of them were registered owners of 50,000 shares of the company, the subject of the consent order and that they had given instructions for any order to be made in respect of their shares and ended their affidavit thus:

> Wherefore we humbly pray that this Honourable Court may be pleased to set aside the said order or alternatively the execution of the order dated 3 October 1983 be stayed.

When the application came on for hearing it was dismissed with costs apparently *inter alia* because the judgment had been perfected and accordingly could not be set aside at the instance of only one of the parties in the action in which the order had been made. The petitioner appeared to have accepted the decision of the Court. He certainly did not appeal against the decision but proceeded to file a civil suit being C.S. C2169/85 making the respondents in the petition defendants and seeking for an order that the consent order of 3 October 1983 be set aside. The ground relied on for the claim was that Counsel for the petitioner had acted without the authority of the petitioner when he obtained the consent order. This writ was caused to be issued on 27 April 1985, just over two weeks after the application to set aside taken out in the petition had been dismissed.

The defendants in the civil suit took out an application invoking O. 18 r. 19 to have the writ set aside and the action struck off. They contended that the averments in the statement of claim and the prayers sought in the statement of claim were identical to the said application of 17 December 1984 that had been brought in the petition which application had been dismissed with costs. They contended that in the premises the plaintiffs were "estopped per *rem judicatur*" from raising the same averments and asking for the same remedy that had been raised and asked for in the said application. They went on to contend that the plaintiffs had no cause of action or alternatively had not disclosed "any valid or justiciable cause of action". The defendants also contended that the action by the plaintiffs was frivolous, vexatious and abuse of the process of Court.

The application was heard by Zakaria Yatim J. He was of the opinion that the claim filed by the plaintiffs was frivolous, vexatious and an abuse of the process of the Court. On 25 March 1986 he ordered that the writ be struck off with costs. The appeal against this decision was dismissed by the Supreme Court on 30 July 1986.

Now, pending the disposal of the said Civil Suit C2169-85 the petitioner had on 9 December 1985 taken out an application in the Originating Petition No. C2/82 seeking a stay of the execution of the consent order of 3 October 1983 until the determination of the civil suit (by which it was hoped that the consent order would be set aside). The said 5 members of the

petitioner's family again supported him in the application for stay pending disposal of the civil suit which support was manifested by a joint affidavit sworn by them in which they make reference to the said civil suit filed by the plaintiffs which affidavit they ended thus:

> 6. There is also a fresh action *vide* KLHC Civil Suit No. C2169/85 to set aside the consent order entered by mistake and we are advised and firmly believe that we have a fair chance of success.
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> 7. We humbly pray that this Court may be pleased to stay the execution of this order dated 3 October 1983.

Also on 9 December 1985 the said members of the family of the plaintiffs took out a summons-in-chambers in the originating petition seeking leave to intervene in the proceedings. The Court granted them leave to intervene.

It was some 5 months after the Supreme Court had dismissed the appeal against the judgment of Zakaria Yatim J that the five members of the petitioners family caused their Writ 22-295-86 to issue seeking for the consent order, to the extent that it affected them to be set aside.

The 1st defendant in this action is Toh Seak Keng the petitioner in Originating Petition No. C2/82. Predictably he appears to have ignored the writ. The other defendants are the respondents in the petition. They filed a statement of defence and for the various reasons set out therein they asked for the plaintiffs' claim to be dismissed with costs.

Eventually the application for execution of the consent order of 3 October 1983 (encl. (58) in the originating petition) and the Civil Suit No. 22-295-86 were consolidated and by consent directions were given for both matters to be disposed of by the trial of the civil suit and for consequential orders to be made in respect of both civil suit and encl. (58) in the petition. It was also by consent directed that trial affidavits filed in both the matters could be read and if necessary the testimony of witnesses could be taken.

When the consolidated matters came on for hearing learned Counsel for both sides most helpfully suggested that the matter be resolved on a preliminary issue, namely, whether the plaintiffs in Civil Suit No. 22-295-86, that is, the members of the family of the petitioner Toh Seak Keng, are estopped from challenging the validity of the consent order of 3 October 1983. Counsel for the defendants quite properly conceded that when the consent order was made the Court in fact had no jurisdiction to make an order binding on the plaintiffs in that they were not parties in those proceedings, that is Originating Petition No. C2/82. Accordingly Counsel on both sides have agreed with my approbation that if the Court holds that the plaintiffs in Civil Suit 22-295-86 are estopped from challenging the validity of the consent order the consequential order to be made would be that the civil suit be dismissed with costs and for an order in terms to be given in respect of the application for execution of the transfer of shares i.e. encl. (58) in the Originating Petition No. C2/82. If, on the other hand, the Court is of the opinion that the plaintiffs are not estopped, then, because of the concession in respect of the jurisdiction, it would follow that the consent order in so far as it affects the plaintiffs in C.S. No. 22-295-86 would be set aside with costs.

Encik S. Selvarajah of Counsel for the 2nd to 5th defendants (the respondents in the petition) relied on *Abuakwa v. Adanse* [1957] 3 All ER 559 the decision of the Privy Council in respect of a West African (as it then was) case to submit that the plaintiffs were estopped from challenging the validity of the consent order. The judgment of the board was read by Lord Denning in the course of which he said:

> The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence; but this general rule admits of two exceptions. One exception is that a person who is in privity with the parties, a 'privy' as he is called, is bound equally with the parties, in which case he is estopped by *res judicata*; the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct.

Encik Selvarajah relied on estoppel by conduct. He contends that the plaintiffs are estopped from seeking to have the consent order set aside for the very reasons that estoppel was successfully invoked in the West African case, that is to say:

1. there was an active participation by them in previous proceedings;
2. taking an active benefit from the judgment in the previous proceedings; and in any event
3. standing by and watching the issues fought out or at least giving evidence in support of the said petitioner both in the petition C2 of 1982 and in Civil Suit No. C2169 of 1985.

(See p. 561 EF & G of *Abuakwa v. Adanse*).

Encik S.C. Loh of Counsel for the plaintiffs contended that the *Abuakwa v. Adanse* is distinguishable:

1. on the facts, and
2. it was based on a custom peculiar to and prevalent in that part of Africa in respect of which custom judicial decisions had given legal sanction.

He contended that it was significant and made all the difference that in the African case each of the parties appeared to have an undivided interest in the lands the subject of the suit, whereas in the case each of the plaintiffs had parcels of the shares of 50,000 each in their respective names separate and distinct from the petitioner's 140,000 shares. He contended that the plaintiffs here had not benefited from previous orders made. He contended that there had not been active participation in the previous proceedings on the part of these plaintiffs. He contended that because the petitioner's 140,000 shares were separate from each lot of 50,000 shares owned by each of the plaintiffs the Court should hold that the interest of the plaintiffs and that of the petitioner were not the same and therefore raising estoppel is misconceived. In his submission there was no evidence of conduct on the part of the plaintiffs relevant for estoppel to be invoked. He contended that the plaintiffs had no interest in the suit filed by the petitioner and the fact that they had affirmed the two affidavits was because they were naturally interested in the petitioner's application to set aside because he was the father of 4 of them and the husband of the 5th of them. This it was contended *per se* did not provide estoppel by conduct. Encik Loh finally contended that the petitioner's suit seeking to have the consent order set aside was on an O. 18 r. 19 application and was based on lack of instructions and although it was dismissed there is nothing to stop him from filing a fresh suit this time based on, say, mistake. He contended that if the petitioner could do that, the right of the plaintiffs in C.S. C. 22-295-86 to file the action based on mistake (and other grounds) is even more so.

In reply Encik Selvarajah referred *inter alia* to *Yat Hung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581 where the Privy Council stated:

> But there is a wider sense in which the doctrine may be applied to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of *res judicata* is the judgment of Wigram V-C in *Henderson v. Henderson* [1843] 3 Hare 100, where the Judge says:
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> ...where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

In my judgment there is no running away from the fact that there were previous proceedings to set aside the consent order of 3 October 1983, namely the original application to set aside the consent order taken out by Toh Seak Keng in his petition as well as the Writ C2169-85 caused to be issued by Toh Seak Keng. The ground relied on in the former of those proceedings was that the consent order was obtained without instruction from the petitioner and on the basis that it contained "many errors and mistake, for example, family members were included in the order who were not named parties in the action. As such they cannot give instructions." In the latter the cause of action was that Counsel for the petitioner acted without the authority of the petitioner entering into the consent judgment.

On the strength of the rule set out in the passage taken from *Henderson v. Henderson* (*supra*) and which was, as has been seen, applied in *Yat Hung Investment Co. Ltd. v. Dao Heng Bank Ltd.* (*supra*) I have to disagree with Encik S.C. Loh's contention that it is open to Toh Seak Keng to file a fresh action seeking to have the consent order set aside on grounds not pleaded in his earlier action. Toh Seak Keng should have brought forward his whole case and not having done so he will not be permitted to open the same subject of litigation in matters which could have been brought up for adjudication in the previous proceedings but were not. Now, even if Toh Seak Keng is estopped from doing so are the plaintiffs in C.S. 22-295-86 estopped?

In my judgment the plaintiffs in C.S. 22-295-86 went beyond just standing by and watching the issues fought out in CS. C2169-85 (which alone according to Lord Denning is sufficient to successfully raise estoppel by conduct). It seems to me clear that they and each of them had directed their minds to the need to have the consent order set aside and had decided initially that the vehicle for obtaining that desired result need only be the application by Toh Seak Keng in the petition and when that failed the Civil Suit C2169-85 brought by Toh Seak as plaintiff. There was clearly the intention to use those proceedings and there was active participation by them in each of those proceedings in the affirming of those affidavits by which they moved the Court for the desired result.

The similar interest that Toh Seak Keng and the said members of his family had were not the shares but having the consent order set aside. The principles in respect of estoppel by conduct set out in *Abuakwa v. Adanse* are of universal application and has been applied in Australia (*Osborne v. Smith* [1960] 3 Aust. Law Journal 368) and in Malaysia (*Ee Kim Kin v. CLR*) [1967] 2 MLJ 89.

Applying those principles to the facts of the case I am of the opinion that the plaintiffs in the instant Civil Suit 22-295-86 are estopped by their previous conduct from now challenging the validity of the consent order by the vehicle of the Civil Suit 22-295-86. Accordingly on the basis of what had been agreed it follows that the said civil suit has to be dismissed with costs. There will be such an order and there will be the necessary consequential orders.

Also found at [1989] 2 CLJ 511